IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 526 OF 2004

Shaukin Jaffer Sayed ... Appellant

v/s.

The State of Maharashtra ... Respondent

Mr. S.V. Kotwal for the appellant.

Mr. V.B.K.Deshmukh, A.P.P. for the Respondent.

CORAM: **V.G. PALSHIKAR &**
SMT. NISHITA MHATRE, JJ.

DATED: **12TH DECEMBER, 2006**

ORAL JUDGMENT (PER SMT. NISHITA MHATRE, J.):

1. This appeal is preferred against the conviction and sentence of the accused under Section 302 of the Indian Penal Code. The II Additional Sessions Judge, Palghar, while imposing the sentence of life imprisonment has also directed the accused to pay a fine of Rs.1,000/-.

2. The prosecution has alleged that the accused his wife and child had dinner in restaurant. After returning home, the accused quarrelled with his wife on some petty issue. The quarrel occurred because of the intake of alcohol by the accused. The accused, in the midst of the

quarrel, emptied the kerosene from a stove on his wife and set her ablaze. She shouted for help and the accused tried to extinguish the fire. He opened the door of the house when she came out, having sustained extensive burns. The accused and his son Gaurav rushed to the victim's mother and brother for help. They then removed the victim to Sanjivani Hospital at Virar for treatment. On admission to the hospital, police were informed that the victim had been burnt by her husband. The police then requested the Special Executive Officer to record the dying declaration of the victim. Accordingly, the Special Executive Officer arrived at the hospital between 2.00 and 2.30 am on 2.6.2002 and recorded the statement of the victim. On the basis of this statement, an offence was registered under Section 307 of the Indian Penal Code. The accused was arrested. The requisite panchanamas were drawn. The victim died on 5.7.2002 when she succumbed to the burn injuries sustained by her. The accused was then tried for having murdered his wife.

3. To prove its case, the prosecution has relied on the testimony of five witnesses. The first witness examined by the prosecution is a child witness who is the son of the accused and the victim. This witness, Gaurav, has described the manner in which his father set his mother ablaze. However, his entire testimony is set at nought

by the witness when he admitted that it was because he was residing with his grandmother and maternal uncle that he had stated that his mother was killed by his father by setting her ablaze. Therefore, the testimony of this witness is of no avail to the prosecution.

4. The victim's statement was recorded by the Special Executive Officer who has been examined as PW-2. He has described the incident, as related to him, by the victim. He has stated that he obtained a thumb impression of the victim on the dying declaration. He has also admitted that he had not taken any endorsement of the doctor on the dying declaration, personally. In the cross-examination, he has admitted that he enquired from the victim whether she was in a position to have a statement recorded since the medical officer was not present. He has admitted further in the cross-examination that the victim was not subjected to any medical examination by the doctor prior to her statement being recorded. This witness has also admitted that thumb impression of the victim was not obtained in his presence. He had handed over the paper on which the statement was recorded to the nurse who obtained the thumb print of the victim. This witness was about 10 ft. away from the patient at that point of time. Again this witness was unable to state whether the thumb print

obtained was of the left thumb or that of the right. In the dying declaration, the victim has stated that they had dinner in the restaurant that night. After returning home, her husband had picked up a quarrel with her without any rhyme or reason. He had abused her and in a fit of rage he had doused her with kerosene from the stove and set her alight. The victim has stated that she shouted for help when her husband locked the door from the inside, wrapped her in a bedsheet and tried to extinguish the fire. The victim states that she opened the latch and ran out of the house shouting for help. However, nobody came to rescue her. Her son Gaurav was with her when the incident occurred. The victim then states that her brother Ashok arrived at her house and she narrated what had happened to him.

5. Significantly, the doctor has not been examined in this case. Therefore, all that is available to the prosecution for proving its case is the eye witness account of Gaurav and the dying declaration. The dying declaration is not endorsed by the doctor in the presence of the Special Executive Officer. The Special Executive Officer has not obtained a certification from the doctor attending the victim that she was in a position to have her statement recorded. There is also no endorsement on the statement to the effect that the victim was mentally

fit and in a position to have a statement recorded. The only endorsement is that, she was conscious. The Special Executive Officer has recorded the statement of the victim on making enquiries with the victim as to whether she was able to have a statement recorded. In such circumstances, the dying declaration will have to be discarded as it lacks authenticity. The testimony of the PW-1, a child witness, also does not help the prosecution in its endeavour to prove the case against the accused. This is because he has admitted at the fag end of his deposition that it was because he was staying with his maternal grandmother that he was deposing against his father.

6. The next witness PW-3 is the victim's brother. He has stated that the accused often imbibed liquor and thereafter quarrelled with the victim and beat her. This witness has also stated that the victim was at the end of her tether facing the behaviour of the accused and, therefore, had stayed with her aunt in Hyderabad for a month. However, the victim in her dying declaration has not spoken of such continuous bad behaviour on the part of the accused. In fact, she has only mentioned the incident which occurred on the day she was burnt. PW-3 is the complainant and he has denied that the victim was brought by the accused and his mother to the hospital;

instead he states that he admitted the victim to the hospital. He has denied the suggestion that the victim set herself ablaze in a fit of rage.

7. PW-4 is a neighbour of the victim. She has spoken about quarrels occurring between the accused and his wife. She states that the victim complained to her on the day of the incident that her husband had beaten her. This witness is not of any help to the prosecution to state positively that it was the accused who had committed the crime. All that this witness has narrated is that there used to be quarrels between the accused and the victim and that the accused often used to beat his wife. However, this cannot lead to the conclusion that the accused had set the victim ablaze on the night when the incident occurred.

8. PW-5 is the investigating officer. This witness has proved the spot panchanama, the inquest panchanama and the post-mortem report received from the medical officer. He has seized the kerosene stove from the scene of offence as also a match-box from there. However, he has admitted in the cross-examination that the finger prints on the kerosene stove have not been analyzed.

9. The accused has tried to set out a theory of suicide

by his wife before the Trial Court. That the victim had sustained burns is proved beyond doubt. That she succumbed to the injuries sustained by her is also a matter of fact. However, there is no evidence to connect the accused to the death of the victim. As stated earlier, the child witness has admitted that he was tutored. The dying declaration is not authentic. Finger prints from the kerosene stove which was seized from the scene of offence have not been analysed. In such circumstances, it would be difficult to accept the version of the prosecution. In fact, the victim's death was initially recorded as an accidental death. It was only after she died that the accused came to be arrested. In such circumstances, we find that we are unable to accept the case of the prosecution.

10. The judgment and order of the Additional Sessions Judge, Palghar, is set aside and appeal is allowed.

11. The accused to be released and set at free, if not otherwise required.

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